Venue for Federal Criminal Prosecution: Proposals in the 109th Congress

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Summary

Venue, the place where federal criminal trials may be held, is a matter of constitutional and statutory law. Several proposals in the 109th Congress would have expanded federal venue. The Supreme Court's recent decisions in *Cabrales* and *Rodriguez-Moreno* suggest that a few of the proposals might have been more limited than their terms might indicate. The proposals dealt with venue in cases involving capital offenses, obstruction of justice, violent crime, drug trafficking offenses, false statements, failure to pay spousal support, wartime procurement fraud, and trial in emergency conditions. They appeared in H.R. 229, H.R. 970, H.R. 1279, H.R. 1751, H.R. 4437, H.R. 4472, S. 12, S. 155, S. 1968, S. 2356, S. 2361, S. 2454, S. 2611, S. 2612. S. 2767, and S. 3875.

Related reports include CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle, which is available in abbreviated form as CRS Report RS22361, *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*, by Charles Doyle.

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Introduction

The Constitution guarantees those accused of a federal crime the right to trial in the state where the crime was committed, U.S. Const. Art. III, §2, cl.3, and the right to trial by a jury selected from the district where the crime was committed, U.S. Const. Amend. VI. In 1998, the Supreme Court held that federal charges involving money laundering, in Florida but of the proceeds from drug trafficking in Missouri, could not be tried in Missouri, *United States v. Cabrales*, 524 U.S.1, (1998). The following year, the Court held that use of a firearm, in Maryland, in connection with a multi-state kidnaping could be tried in New Jersey, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). Subsequent Congresses have seen a number of proposals to expand venue for the trial of various federal criminal offenses. The pattern continued in the 109th. Constitutional venue requirements understood in light of *Cabrales* and *Rodriguez-Moreno* might have precluded realization of the full literal benefits of some of these proposals.

Cabrales and Rodriguez-Moreno

Cabrales is not as restrictive as it might seem at first; nor is *Rodriguez-Moreno* as permissive. Cabrales laundered the Missouri drug money in Florida, but there was no evidence that she was a member of the Missouri drug trafficking conspiracy or that she had transported the money from Missouri to Florida. The Court acknowledged that she might have been tried in Missouri had either been the case, 524 U.S. at 8, 10.

Rodriguez-Moreno and his confederates kidnapped a drug trafficking associate and transported him over the course of time from Texas to New Jersey and then to Maryland. Rodriguez-Moreno acquired the firearm with which he threatened the kidnap victim in Maryland but was tried in New Jersey for using a firearm "during and in relation to a crime of violence [kidnaping]" in violation of 18 U.S.C. 924(c)(1). Section 924(c)(1) in the eyes of the Court has "two distinct *conduct elements* . . . using and carrying of a gun and the commission of a kidnaping," 526 U.S. at 280 (emphasis added). A crime with distinct conduct elements may be tried wherever any of those elements occurred; kidnaping is a continuous offense that in this case began in Texas and continued through New Jersey to Maryland; venue over the kidnaping, a conduct element of the section 924(c)(1), was proper in Texas, New Jersey or Maryland; consequently venue over the violation of section 924(c)(1) was proper in either Texas, New Jersey or Maryland, 526 U.S. at 280-82.

The Court was quick to distinguish *Cabrales* from *Rodriguez-Moreno*: "The existence of criminally generated proceeds [in *Cabrales*] was a circumstance element of the offense but the proscribed conduct—defendant's money laundering activity—occurred after the fact of the offense begun and completed by others." In *Rodriguez-Moreno*, "given the 'during and in relation to' language, the underlying crime of violence is a critical part of the §924(c)(1) offense," 526 U.S. at 280-81 n.4. The Court also declined to address the so-called "effects" test used by the some of the lower federal courts in obstruction of justice and Hobbs Act ("effect") cases to determine the presence of proper venue, 526 U.S. at 279 n.2.

Obstruction of Justice

One of the most common venue proposals in the 109th Congress related to retaliation against witnesses in federal proceedings, 18 U.S.C. 1513. It is found in H.R. 970/S. 155 (§207), S. 1968 (§8), H.R. 1751 (as passed by the House, §10/ as passed by the Senate, §204), H.R. 4028 (§312),

H.R. 4472 (§715) (as passed by the House), and S. 2767 (§1086) (as passed by the Senate). Under the proposal a new subsection would have been added to section 1513 of Title 18 reading, "A prosecution under this section may be brought in the district in which the official proceeding (whether or not pending, about to be instituted or completed) was intended to be affected or was completed, or in which the conduct constituting the alleged offense occurred," proposed 18 U.S.C. 1513(g). The language replicated that found in 18 U.S.C. 1512(h) concerning venue in federal witness tampering cases and added to section 1512 in 1988 prior to *Cabrales* or *Rodriguez-Moreno*.

The "official proceeding affected" would appear to have more closely resembled the "circumstance element" found insufficient in *Cabrales* than the "conduct element" approved in *Rodriguez-Moreno*. In what seems to be the only federal appellate decision to address the question, the Fourth Circuit concluded that its earlier approval of venue under section 1513 in the district where the official proceeding had been, were being or would be held "cannot be reconciled with the Supreme Court's later decisions in *Cabrales* and *Rodriguez-Moreno*. Rather the Supreme Court's recent venue decisions instruct that the nature of the crime refers only to the conduct constituting the offense and that the conduct constituting the offense is limited to essential conduct elements," *United States v. Bowens*, 224 F.3d 302, 312 (4th Cir. 2000).

Violence During and In Relation to Drug Trafficking

A second common proposal would have built upon the scheme approved in *Rodriguez-Moreno*. The statute before the Court, 18 U.S.C. 924(c)(1) outlaws the use of a firearm "during and in relation" to a crime of violence or serious drug offense. Several bills—e.g., H.R. 970/S. 155 (§108), H.R. 1279 (as passed the House) (§106)—proposed a new federal crime, one that would have prohibited the commission of a crime of violence "during and in relation" to a drug trafficking offense, proposed 21 U.S.C. 865. They would have permitted prosecution for such an offense "in (1) the judicial district in which the murder or other crime of violence occurred; or (2) any judicial district in which the drug trafficking crime may be prosecuted," proposed 21 U.S.C. 865(b).

This analogy to *Rodriguez-Moreno* seems likely to have worked, especially if the drug trafficking offense, like the kidnaping offense in *Rodriguez-Moreno*, was considered a continuous offense in time and space. Many drug trafficking offenses are likely to be considered continuing offenses for venue purposes, *see e.g.*, *United States v. Zidell*, 323 F.3d 412, 422 (6th Cir. 2003)(possession with intent to distribute); *United States v. Brown*, 400 F.3d 1242, 1250 (10th Cir. 2005)(manufacturing methamphetamine). Moreover, although Rodriguez-Moreno used a firearm during and in relation to a continuing offense (kidnaping) that occurred in the same district, that does not appear to have been necessary for the Court's analysis. The Court's analysis suggests no different result if the kidnap victim had been kept in New Jersey and never been transported to Maryland, but Rodriguez-Moreno had traveled to Maryland and used a firearm there to discourage an informant from disclosing the victim's whereabouts to authorities. "Where a crime consists of distinct parts which have different localities, the whole may be tried where any part can be proved to have been done," 526 U.S. at 281. In the case of the proposal, the new crime apparently would have consisted of two conduct elements, a crime of violence and a drug trafficking crime; it would seem to have followed that the new crime might have been tried wherever either the crime of violence or a continuous drug trafficking offense occurred.

Venue in Capital Cases

The same bills that propose venue changes for drug-related crimes of violence, would have replaced an existing provision relating to venue in capital cases, H.R. 970/S. 155 (§203), H.R. 1279 (as passed by the House)(§110), and H.R. 4472 (as passed by the House)(§810). Existing law provides that where possible capital cases should be tried in the county in which the crime occurred, 18 U.S.C. 3235. Section 3235 is followed by a section that provides that murder and manslaughter cases should be tried where the death-causing injury was inflicted regardless of where death actually occurs, 18 U.S.C. 3236. The more specific instruction of section 3236 overrides the general multi-district venue provisions of 18 U.S.C. 3237(a) which provides that multi-district crimes may be tried where they are begun, continued, or completed and that offenses involving the use of the mails, transportation in interstate or foreign commerce, or importation into the United States may be tried in any district from, through, or into which commerce, mail, or imports travel.

At least one federal appellate court has held that the specific instruction of section 3236 overrides the general instructions of section 3237(a) only with regard to "unitary" murder offenses, such as murder by a federal prisoner, 18 U.S.C. 1118. Section 3236 does not apply, the court held, to "death resulting" cases, cases where murder is a sentencing element rather than a substantive element of the offense, such as in cases of a violation of 18 U.S.C. 924(c)(use of a firearm during and relating to the commission of crime of violence), the sentence for which is determined in part by whether death resulted from the commission of the offense, *United States v. Barnette*, 211 F.3d 803, 814 (4th Cir. 2000).

The proposal would have repealed the "county trial" language of section 3235 and replaced it with language reminiscent of the multi-district terms of section 3237(a): "(a) the trial of any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed. (b) If the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred."

Although it is far from certain, the proposal apparently intended to repeal the "county trial" feature of section 3235 and, by indirection, repeal the section 3236 override of multi-district section 3237 in murder cases. The manslaughter features of 3236 would presumably have continued in place since they are not capital cases and thus by definition would have been beyond the reach of the proposed capital venue provisions of the amended section 3235.

Constructional quandaries aside, it is not clear that predicating venue upon the interstate impact of related conduct will always survive analysis under *Cabrales*. The proposal apparently would have permitted trial of an offense in a district in which related conduct affecting interstate or foreign commerce occurred even if the offense itself was committed entirely in another district. The *Cabrales*' money generating drug trafficking in Missouri would seem to qualify as conduct related to the laundering in Florida. Nor would the proposal always meet *Rodriguez-Moreno*'s "conduct element" standard. There was nothing in the proposal that would have required that the "related conduct affecting interstate commerce" be an element of the offense to be tried. In fact, the alternative wording—"if the offense, or related conduct . . . involves activities which affect interstate commerce"—seemed to contemplate situations in which affecting commerce was not an element, conduct or otherwise, of the offense.

False Statements in Passport Applications

H.R. 4437 (§213), as passed by the House, would have outlawed making false statements in a passport application, mailing or presenting a passport application containing a false statement, or causing the production of a passport by fraud or false application, proposed 18 U.S.C. 1542. The bill's additional venue section would have allowed prosecution in "(1) any district in which the false statement or representation was made; or (2) any district in which the passport application was prepared, submitted, mailed, received, processed, or adjudicated; or (3) in the case of an application prepared and adjudicated outside the United States, in the district in which the resultant passport was produced," proposed 18 U.S.C. 1551. Similar provisions were found in S. 2611 (§208), as passed by the Senate, S. 2612 (§208), and S. 2454 (§208). The proposals seemed compatible with constitutional requirements as explained in *Cabrales* and *Rodriguez-Moreno*. With the exception of subsection (3), venue seemed to be pegged to the conduct elements of the new offense. As to subsection (3), the Constitution authorizes Congress to provide venue for crimes committed outside of the United States, U.S. Const. Art.III, §2, cl.3; Amend. VI.

Violence in Aid of Racketeering

Section 105 of H.R. 1279, as passed by the House, would have amended 18 U.S.C. 1959(a) to outlaw crimes of violence committed (1) for hire at the behest of a racketeering enterprise, (2) to further the purposes of a racketeering enterprise, or (3) to acquire, maintain or enhance the offender's position within a racketeering enterprise. It would have added a new subsection 1959(c) under which violations of the section may be prosecuted in "(1) the judicial district in which the crime of violence occurred; or (2) in any judicial district in which racketeering activity of the enterprise occurred." Section 1959 would have used the definition of "racketeering activity" found in 18 U.S.C. 1961 that lists the crimes which mark the activities of a racketeer influenced and corrupt organization (RICO), 18 U.S.C. 1959(b). It is uncertain whether venue over a section 1959 offense would have been constitutionally proper in any district where a RICO predicate offense ("racketeering activity") had been committed. For instance, the section 1959 "for hire by a RICO enterprise" crime of violence might easily have been compared to the "after the fact" money laundering in *Cabrales*. On the other hand, the section 1959 "in furtherance of a RICO enterprise" crime, and perhaps the "in furtherance of a position in a RICO enterprise" crime, seem to more closely resemble the conspiratorial or aiding and abetting exceptions suggested in *Cabrales*.

Runaway Spouses

H.R. 229 would have outlawed interstate flight to avoid court ordered payments to a spouse or ex-spouse and the failure to make such payments with respect to spouse or ex-spouse living in another state, proposed 18 U.S.C. 228A(a). Venue would have been proper in the district in which either party resided or any other district recognized by law, proposed 18 U.S.C. 228A(e). In a case prior to *Rodriguez-Moreno* but after *Cabrales*, the Eleventh Circuit upheld an identical venue provision found in the child support provisions of 18 U.S.C. 228, *United States v. Muench*, 153 F.3d 1298, 1300-304 (11th Cir. 1998). The results would seem to have been compatible with *Rodriguez-Moreno*. Since payment would have involved both tender and receipt, failure to pay would have constituted a "conduct element" occurring both where the debtor and the creditor were found.

Trial in Emergency Conditions

In emergency conditions and with the consent of the accused, P.L. 109-63, the Federal Judiciary Emergency Special Sessions Act of 2005, criminal trials may be held outside the state in which the offense occurred before a jury drawn from outside the district in which the offense occurred, 28 U.S.C. 141(b). Although there is no Supreme Court precedent directly on point, the lower federal appellate courts have held without exception that the accused may waive the Constitution's venue requirements, *see e.g.*, *United States v. Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005); *United States v. Ebersole*, 411 F.3d 517, 525 (4th Cir. 2005); *United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005); *United States v. Rendon*, 354 F.3d 1320, 1326 n.5 (11th Cir. 2003); 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §306 (2000).

War Profiteering and Fraud

Section 502 of S. 12 would have outlawed wartime profiteering and fraud and permitted trial anywhere the general venue chapter of Title 18 (chapter 211) would have authorized it as well as in "any district where any act in furtherance of the offense took place" or where "any party to the contract or provider of goods or services is located." The proscription extends to fraud, concealment or falsification of material facts, and overvaluation in a procurement context, proposed 18 U.S.C. 1038(c). It does require the participation of multiple defendants. Comparable proposals appeared in H.R. 4682 (§705), S. 2356 (§2), S. 2361 (§101), and S. 3875 (§1402). Other than in cases brought in reliance on chapter 211 or where the misconduct occurred overseas, establishing compatibility between the new venue claims and the constitutional requirements as explained in *Cabrales* and *Rodriguez-Moreno* might have proved challenging.

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